No. 10-920

In the Supreme Court of the United States

ANA ROSA OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Benjamin R. Casper
IMMIGRANT LAW CENTER
OF MINNESOTA
450 N. Syndicate Street
St. Paul, MN 55104
(651) 271-6661

Dean C. Eyler
GRAY PLANT MOOTY
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 632-3016

Richard P. Bress
Lori Alvino McGill
Counsel of Record
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
lori.alvino.mcgill@lw.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by holding—consistent with two other circuits and in conflict with at least four other circuits—that federal courts are categorically incompetent to review a Board of Immigration Appeals decision denying a motion to reopen removal proceedings *sua sponte*, even where that decision applies a legal standard, on the ground that such decisions are "committed to agency discretion by law." 5 U.S.C. §701(a)(2).

2. Whether the Eighth Circuit erred by disregarding the BIA's stated grounds for its decision, in conflict with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and the decisions of other circuits.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES III

ARGUMENT 1

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Cevilla v. Gonzales,
446 F.3d 658 (7th Cir. 2006), *cert. denied*,
552 U.S. 826 (2007) 6, 7

Cruz v. Attorney General,
452 F.3d 240 (3d Cir. 2006) 2

Dada v. Mukasey,
554 U.S. 1 (2008) 11

FEC v. Akins,
524 U.S. 11 (1998) 3

Fleshman v. West,
138 F.3d 1429 (Fed. Cir. 1998) 3

Gonzales v. Thomas,
547 U.S. 183 (2006) 2

Gor v. Holder,
607 F.3d 180 (6th Cir. 2010), *petition for cert. pending*, No. 10-940 (filed Jan. 18, 2011) 9

Habchy v. Gonzales,
471 F.3d 858 (8th Cir. 2006) 4

Hamad v. Ashcroft,
350 F.3d 201 (1st Cir. 2003) 2

Herndon v. Georgia,
295 U.S. 441 (1935) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Iavorski v. U.S. INS,
232 F.3d 124 (2d Cir. 2000) 4

INS v. Ventura,
537 U.S. 12 (2002) 1, 2

Kucana v. Holder,
130 S. Ct. 827 (2010) 2, 8

Matter of Diaz-Ruacho,
24 I.& N. Dec. 47 (B.I.A. 2006) 11

Mejia-Hernandez v. Holder,
633 F.3d 818 (9th Cir. 2011) 8

Morgan Stanley Capital Group Inc. v. Public Utility District No. 1,
554 U.S. 527 (2008) 3

Negusie v. Holder,
129 S. Ct. 1159 (2009) 2

NLRB v. Wyman-Gordon Co.,
394 U.S. 759 (1969) 4

Pilapil v. Attorney General,
--- F.3d ---, No. 09-4454, 2011 WL 1278741
(3d Cir. Apr. 6, 2011) 2, 6

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 1, 2

TABLE OF AUTHORITIES—Continued

Page(s)

Tamenut v. Mukasey,
521 F.3d 1000 (8th Cir. 2008) 2, 11

Yee v. City of Escondido,
503 U.S. 519 (1992) 9

STATUTES AND REGULATIONS

5 U.S.C. §701(a)(2) 5

8 C.F.R. §1003.2(c) 7

8 C.F.R. §1240.26(e)(1) 11

ARGUMENT

I. The government concedes that the court of appeals reviewed petitioner's motion *de novo* and construed it as a motion to reopen *sua sponte* (Opp.8, Opp.10), even though the court recognized that "the Board appeared to treat the motion as a timely motion seeking reopening based on new evidence" (Opp.8). But *Chenery* forbids a court to substitute its own judgment for the agency's on a matter entrusted to the agency's discretion. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). There is perhaps no plainer, or more fundamental, principle of administrative law. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (summarily reversing where court of appeals had "'conduct[ed] a *de novo* inquiry into the matter being reviewed'" instead of "'remand[ing] to the agency for additional investigation of explanation'" under *Chenery*). Perhaps that is why, on rehearing, the government declined to defend this aspect of the Eighth Circuit's decision. *See* App.17a (Colloton, J., dissenting).

The government now argues that this plain violation of *Chenery* does not matter because petitioner invited the error (Opp.21); and, alternatively, that *Chenery* does not require a remand when the agency is likely to reach the "'same ultimate result'" on remand (Opp.19-20). The government is mistaken on both counts.

1. The government argues that the Eighth Circuit's error should be excused because the court was "understandably uncertain about how to characterize petitioner's motion." Opp.10; Opp.19 (same); Opp.20 (any *Chenery* error "is one of [petitioner's] own making"); Opp.21 ("Any *Chenery* issue is a direct consequence of the fact that

petitioner's filing was unclear."). This argument misses the point: the Eighth Circuit had no business "characteriz[ing] petitioner's motion" in the first place. If the court of appeals was confused about the basis of BIA's decision denying reopening, it was required by *Chenery* to remand the case for clarification about *the ground of BIA's decision*—so that the court of appeals could later determine, based on the agency's actual rationale, whether its decision was reviewable for abuse of discretion (per *Kucana v. Holder*, 130 S.Ct. 827 (2010)), or not (per *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008)). *See, e.g., Negusie v. Holder*, 129 S.Ct. 1159, 1167-68 (2009); *Chenery*, 332 U.S. at 196.

The Eighth Circuit's determination to construe petitioner's motion *de novo* also conflicts squarely with the decisions of other circuits remanding to BIA for further explanation in virtually identical circumstances. *See Cruz v. Att'y Gen.*, 452 F.3d 240, 250 (3d Cir. 2006) (remanding where it was unclear "whether the BIA declined to exercise its *sua sponte* authority on a reviewable or non-reviewable basis"); *Haoud v. Ashcroft*, 350 F.3d 201, 205, 207-08 (1st Cir. 2003) (remanding for clarification of the grounds of BIA's decision); *Pllumi v. Att'y Gen.*, ---F.3d---, No.09-4454, 2011 WL 1278741, at *6 (3d Cir. Apr. 6, 2011) (remanding "for clarification of the basis for its decision declining to exercise its discretion to reopen"); *see* Pet.32-33.

The Solicitor General does not hesitate to request summary reversal for similar *Chenery* transgressions when the shoe is on the other foot. *See, e.g., Gonzales v. Thomas*, 547 U.S. 183, 185 (2006); *Ventura*, 537 U.S. at 16. This fundamental limitation on judicial power

should apply with as much force here as it does when the *government* is seeking a remand. Pet.32-33.

2. The government also contends that *Chenery* did not require a remand because "it is clear that the agency would have reached the same ultimate result had it considered the new ground." Opp.19-20 (quoting *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998)); *see* Opp.20 ("There is no reason to believe that the Board's conclusion would have been different if the case had been remanded."). That argument profoundly misapprehends *Chenery* (and the issues in this case).

If the government actually means to suggest that *Chenery* does not require remand whenever, in the court's judgment, the party seeking remand is not likely to obtain ultimate relief, it is badly mistaken. There is no support in law for such an ad hoc, "flexible" (Opp.19) exception to *Chenery*. It is well settled that *Chenery* applies even where the agency is very likely to reach the same result on remand. *FEC v. Akins*, 524 U.S. 11, 25 (1998) (remand under *Chenery* required "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason"). The government's contrary approach would obliterate the rule.

To be sure, *Chenery* does not require a remand where the ultimate outcome of proceedings is *compelled* by statute or Supreme Court precedent, such that the agency lacked discretion to reach a different result. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-45 (2008) (upholding FERC order on basis raised by agency for the first time on appeal because result was *compelled*

by law).[1] But the government does not argue—and the Eighth Circuit did not hold—that the Board was *required* to treat petitioner's motion as one invoking solely its *sua sponte* reopening authority. To the contrary, the government asserts that the basis of petitioner's timely motion was "unclear."[2]

Plenary review is warranted to restore uniformity in this important area of administrative law. Because the Eighth Circuit's error was blatant in light of *Ventura* and *Thomas*, summary reversal also would be appropriate.

---

[1] The government's passing reference (Opp.19) to *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality), is inapt. The plurality rejected a dissenter's suggestion that *Chenery* required a remand where the adjudicative order under review merely referred to an invalid rule but was itself indisputably a proper and reasoned exercise of the Board's authority. *Id.* at 763-67 & n.6. That portion of *Wyman-Gordon* has been cited by this Court exactly once since then (*Morgan Stanley*).

[2] In truth, it is perfectly clear that the BIA recognized petitioner's motion to reopen as based on new evidence per §1003.2(c). The Board found that petitioner "filed a timely motion to reopen ... based upon ineffective assistance of counsel and her son's medical condition." Pet.App.28a. As the Board and the courts have uniformly recognized, "[c]laims of ineffective assistance of counsel satisfy [§1003.2(c)'s] requirement that motions to reopen present 'new facts' that are 'material and [were] not available and could not have been discovered or presented at the former hearing.'" *Iavorski v. U.S. INS*, 232 F.3d 124, 129 (2d Cir. 2000); *see also* U.S.Br.11, *Li v. Holder*, No. 09-157 (filed Nov. 9, 2009) (noting that ineffective assistance claims like petitioner's "are most often presented in the context of motions" to reopen under §1003.2(c)). *Contra* Opp.10. The courts of appeals have reviewed scores of BIA decisions involving such claims. *E.g.*, *Habchy v. Gonzales*, 471 F.3d 858 (8th Cir. 2006).

II. The government tries to downplay the sharp disagreements among the court of appeals over the reviewability of the BIA's *sua sponte* reopening decisions by suggesting that the Eighth Circuit has not foreclosed review in all such circumstances. The government also suggests that this is not a suitable vehicle for reviewing the issue. Neither argument is persuasive. The Eighth Circuit squarely held that the BIA's decision denying petitioner's motion to reopen was unreviewable because it is "committed to agency discretion by law" under 5 U.S.C. §701(a)(2), citing its previous en banc decision in *Tamenut*. Pet.App.7a-8a. And *Tamenut* makes crystal clear the circuit's view that the Board's *sua sponte* decisions are *categorically* beyond appellate scrutiny, thereby aligning itself with the Fourth and Sixth Circuits in conflict with decisions of at least three other courts of appeals.

Amici curiae—fifteen prominent administrative law scholars, including authors of the leading case book and treatise on the subject—explain that this conflict reflects profound and longstanding confusion in the lower courts about how to determine whether agency action falls within §701(a)(2)'s bar. *Amici* strongly urge this Court to grant review to provide much-needed and long overdue guidance to the courts of appeals on the proper framework for determining whether a decision is "committed to agency discretion by law." The government has no response whatsoever to *amici*'s demonstration of the need for this Court's intervention, and its various attacks on the suitability of this case as a vehicle for addressing the question are misguided.

1. The First, Second, and Third Circuits have held that the reviewability of BIA's *sua sponte*

reopening decisions depends on the *character* of that decision, and will review such decisions to the extent they raise questions susceptible to ordinary abuse-of-discretion review. Pet.17-18. The Third Circuit has recently reiterated that view. *Pllumi*, 2011 WL 1278741, at *6 (reviewing BIA's denial of *sua sponte* reopening, where it appeared BIA's decision may have rested on a misunderstanding of law). The Seventh Circuit also has strongly suggested it agrees, stating that it would review for abuse of discretion any time the BIA has applied "a legal standard." *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006), *cert. denied*, 552 U.S. 826 (2007). The government remarkably fails even to cite these cases in its brief, and its half-hearted effort to persuade this Court that there is no circuit conflict is unavailing.

Notwithstanding the unequivocal holdings of the Fourth, Sixth, and Eighth Circuits that courts may not review BIA *sua sponte* decisions, the government suggests that it is not entirely clear whether those courts would craft an exception for "questions of law." Opp.18 & n.3. There is nothing to suggest that they would. The Eighth Circuit held review was barred in this case, without considering the character of the BIA's decision, because under *Tamenut* it simply does not matter.

The government does not deny that at least three circuits approach this question by considering the character of the individual decision and whether there is "law to apply" under *Heckler*. In any of those circuits, the BIA's decision in this case purporting to apply the legal framework set out in *Matter of Lozada* and *Matter of Coelho* would have been reviewed for

abuse of discretion.[3] In the Fourth, Sixth, and Eighth Circuits, however, review is categorically barred, based solely on the Attorney General's regulation (the subject of *Kucana*) indicating that the BIA has discretion over such matters. The conflict is real, and makes a difference in this case.

2. The government argues that *Kucana* has no bearing on this question, because that case addressed whether IIRIRA barred review and in this case whether BIA's decision is reviewable under the APA "turns on whether the regulations confer private rights and whether there are meaningful standards to guide agency decisionmaking." Opp.13. The government once again misses the point. In deciding that IIRIRA did not eliminate judicial review, *Kucana* cited favorably, and relied on, the long line of precedent establishing the general reviewability of BIA's reopening decisions. And there is no less a "private right" at stake, and no less a "meaningful standard[] to guide agency decisionmaking," when the BIA considers whether to reopen in response to a motion invoking its *sua sponte* authority.

Nothing in 8 C.F.R. §1003.2(c) "confer[s] any privately enforceable rights" that could distinguish ordinary reopening requests from those invoking the Board's "*sua sponte*" authority. Regulation 1003.2(c) sets forth circumstances in which a timely motion to

---

[3] The government wrongly suggests (Opp 18n.3) that the BIA's decision here would not be reviewable in those circuits because petitioner challenges "application of settled legal principles" instead of "the meaning of a law or regulation." *See Cevilla*, 446 F.3d at 660-61 (explaining that "no law to apply" doctrine does not bar review of "the application of a legal standard"). *Heckler* provides no basis for such a distinction.

reopen "shall *not*" be granted. It does not purport to limit the Board's discretion to deny relief in any particular case.

Similarly, §1003.2(a), which confers on the BIA discretion to grant or deny a motion to reopen, applies equally to *sua sponte* consideration and ordinary motions to reopen. This Court in *Kucana* recognized that although "[t]he BIA has broad discretion ... 'to grant or deny a motion to reopen,' 8 C.F.R. §1003.2(a)," "courts retain jurisdiction to review, with due respect, the Board's decision." 130 S.Ct. at 838. But if the government is correct that the character of the Attorney General's regulations and the absence of a conferred "right" render *sua sponte* decisions unreviewable, then *Kucana* must have been wrong about the reviewability of general reopening decisions, because all of BIA's decisions involving motions to reopen—including the decision at issue in *Kucana*—would be unreviewable under §701(a)(2), notwithstanding this Court's holding that IIRIRA preserves appellate *jurisdiction* to review them. Pet.22-23. That would be a dramatic departure from settled law, as "[f]ederal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." *Kucana*, 130 S.Ct. at 834.

At least two courts of appeals have explicitly acknowledged that *Kucana* casts doubt on the viability of circuit decisions holding that *sua sponte* reopening decisions are unreviewable; those courts nevertheless have found themselves bound by their precedent because, as noted, *Kucana* reserved judgment on the question. *See Mejia Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011) ("The overall thrust of *Kucana*

suggests that *sua sponte* reopening should be subject to review. ... Were this an issue of first impression, a right to review might be recognized."); *Gor v. Holder*, 607 F.3d 180, 188 (6th Cir. 2010) ("[*Heckler*] does not support a conclusion that an *agency* can strip a court of jurisdiction to review its own actions by enacting regulations that deem these actions discretionary."), *petition for cert. pending*, No. 10-940 (filed Jan. 18, 2011). This Court should grant certiorari now to address that question.

3. The government's suggestion (Opp.13-14, 18) that petitioner somehow failed adequately to preserve her argument that BIA decisions applying a legal framework afford ample "law to apply" is meritless. As explained in the petition, because the government *conceded* on appeal that the BIA's order was reviewable for abuse of discretion, petitioner had no reason to anticipate the court of appeals' uninvited holding that review was barred by *Tamenut*. Petitioner then argued on rehearing that the Eighth Circuit's holding "misconstrues *Heckler*" and should be reconsidered in light of *Kucana*. Pet'n for Reh'g 1-2, 12-15. There is no preservation problem here. *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

4. The government's other supposed "vehicle problems" are equally unavailing. The government's suggestion that the presence of the "*Chenery* issue" makes this case an undesirable vehicle to consider the Eighth Circuit's reviewability holding is absurd. If the Acting Solicitor General agrees with Judge Colloton that the panel violated *Chenery*, then he should have confessed error and recommended summary reversal on that ground. Having chosen to defend the court of

appeals' decision to construe petitioner's motion, however, the government cannot have its cake and eat it too.[4] The court of appeals squarely held that BIA's denial of a motion to reopen *sua sponte* is categorically unreviewable. Petitioner seeks review of that holding. That it "is not clear whether petitioner was requesting *sua sponte* reopening" (Opp.21) only heightens the need for this Court's review. The Eighth Circuit here applied its categorical rule notwithstanding that there is no substantive difference between the BIA's order in this case and its orders in scores of cases that are reviewable under *Kucana*. And for the reasons stated by Judge Colloton, petitioner's challenge to that cursory, unreasoned order has substantial merit. That makes this case a compelling vehicle.[5]

Equally flawed is the government's suggestion that this is not a suitable vehicle because the court of appeals "covered [its] bases" (Opp.19) by holding "in the alternative" that the Board did not abuse its discretion. Opp.14-15. The Eighth Circuit did not so hold. Indeed, any alternative "holding" that the BIA did not abuse its discretion would be logically inconsistent with the court's unequivocal holding that the BIA's decision is unreviewable because there is (purportedly) "no law to apply." Certainly Judge Colloton did not understand the majority to have

---

[4] The Court would fail to reach that question *only if* it agrees with petitioner that the court of appeals violated *Chenery*. Either way, the Court would reach at least one of the two questions presented.

[5] Two other pending petitions, No. 10-940, *Gor v. Holder*, and No. 10-1039, *Neves v. Holder*, raise the *Heckler/Kucana* reviewability issue. If this Court grants certiorari in either of those cases, it should grant this case and consolidate them.

articulated an alternative holding. Pet.App.8a-14a. The court of appeals did acknowledge a "possibl[e] argu[ment]" that, "*if* [BIA had] indeed" treated a *sua sponte* motion "as one filed under §1003.2(c)," there would be a "plausible meaningful standard we would normally find lacking in the *sua sponte* context." Pet.App.8a n.4 (emphasis added). Such hypothetical musings are no basis upon which to deny review in this case, given the unequivocal holding of the en banc Eighth Circuit in *Tamenut* that the character of §1003.2(a) renders these decisions categorically unreviewable. 521 F.3d at 1004-05.

Finally, the government's suggestion that petitioner is unlikely to obtain the relief she seeks is utterly baseless and, in any event, provides no reason to deny review of the exceptionally important questions presented here. This Court can reach both questions presented regardless of whether petitioner ultimately will be granted cancellation upon an eventual remand to the Board. Moreover, petitioner has not "overstayed her period of voluntary departure." *Contra* Opp.21. As the government acknowledges (Opp.22), under *Matter of Diaz-Ruacho*, 24 I.&N. Dec. 47 (B.I.A. 2006), petitioner's voluntary departure order is void because she did not post bond; instead, she and her former counsel filed a timely motion to reopen before the departure period expired. *Cf. Dada v. Mukasey*, 554 U.S. 1, 21 (2008). As the Board itself recognizes, in these circumstances petitioner is not subject to any penalties for staying in the United States to pursue humanitarian relief for the benefit of her disabled U.S. citizen child. 8 C.F.R. §1240.26(e)(1).

CONCLUSION

The petition should be granted, and the case should be set for argument or summarily reversed.

Respectfully submitted,

Richard P. Bress
Lori Alvino McGill
Counsel of Record
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
lori.alvino.mcgill@lw.com

Benjamin R. Casper
IMMIGRANT LAW CENTER
OF MINNESOTA
450 N. Syndicate Street
Suite 175
St. Paul, MN 55104
(651) 271-6661

Dean C. Eyler
GRAY PLANT MOOTY
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 632-3016

Counsel for Petitioner